Internal EU27 preparatory discussions on the framework for the future relationship: "Governance"

European Commission, Task Force for the Preparation and Conduct of the Negotiations with the United Kingdom under Article 50 TEU

These slides are for presentational and information purposes only and were presented to the Council Working Party (Article 50) on 11 January 2018. The contents are without prejudice to discussions on the framework of the future relationship.

In December 2017, the European Council invited the Council (Art. 50) together with the Union negotiator to continue internal preparatory discussions on the scope of the future EU-UK relationship. The slides support those discussions. They are based on the April European Council guidelines which continue to apply in their entirety.

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Internal preparatory discussions on framework for future relationship

Governance

AD HOC WORKING PARTY ON ARTICLE 50 (Seminar mode)
11/01/2018
A. Introduction

I. The three components of governance of an international agreement

II. The relevant legal instruments to be covered

III. Basic legal requirements flowing from ECJ case law
I. The three components of governance of an international agreement

1. Ongoing management / supervision:
   - Joint Committee

2. Dispute settlement:
   - Political (Joint Committee)
   - Judicial (Arbitration)

3. Enforcement after dispute settlement:
   - Sanctions
II. The relevant legal instruments to be covered

1. The Withdrawal Agreement

- Overall governance of Withdrawal Agreement
- Special governance for citizens' rights chapter
- Other separation issues
- Special governance in case of a transition period: normal rules pursuant to Articles 258 et seq. TFEU
Overall governance of the Withdrawal Agreement
(Principles Paper on Governance, July 2017)

ECJ Judgments
Binding + enforceable

Either party can refer dispute to the ECJ

COMMISSION

NAT. COURTS

JOINT COMMITTEE

Citizens' rights/cont. application of Union law

Other provisions:
e.g. default of schedule of payments or failure to transmit files
**Special governance for citizens' rights chapter**

| CJEU | • UK Courts shall have due regard to relevant decisions of the CJEU after the specified date.  
      | • Mechanism enabling UK courts or tribunals to decide, having had due regard to whether relevant case-law exists, **to ask the CJEU questions of interpretation** of those rights where they consider that a CJEU ruling on the question is necessary for the UK court or tribunal to give judgment in a case before it (mechanism **available for litigation brought within 8 years**). |
| Other mechanisms for consistency | • **Exchange of case law** between the courts and **regular judicial dialogue**.  
                               | • **Cross interventions** (for the UK government before the CJEU, for the Commission before UK courts). |
| Implementation and application | • In the UK, this role will be fulfilled by an **independent national authority**; its scope and functions, including its role in acting on citizens' complaints, will be discussed between the parties in the next phase of the negotiations and reflected in the Withdrawal Agreement. |
2. Agreement(s) on future relations EU – UK
III. Basic legal requirements flowing from ECJ case law (1)

- An agreement with judicial bodies in principle possible – but constraints:
  - Dispute settlement may not bind EU, internally, to a particular interpretation of EU law
  - Judicial body may not interpret provisions in substance identical to EU law
  - Joint Committee decisions must not affect ECJ case-law
III. Basic legal requirements flowing from ECJ case law (2)

- No powers to rule on respective competences of EU and Member States
- No organic links (no judges sitting in double capacity)
- ECJ rulings must be binding in any case
B. Ongoing management and supervision: Joint Committee (I)

CETA – Joint Committee

<table>
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<th>Tasks</th>
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<td>• Responsible for all questions concerning trade and investment between the Parties and the implementation and application of CETA.</td>
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<td>• Supervises and facilitates the implementation and application of CETA and furthers its general aims; supervises the work of all specialised committees and other bodies established under CETA.</td>
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<td>• Seeks appropriate ways and methods of preventing problems, or of resolving disputes regarding the interpretation or application of CETA.</td>
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<td>• Is informed of Dispute Settlement</td>
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<th>Powers</th>
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<td>• Delegate responsibilities to the specialised committees.</td>
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<td>• Consider or agree on amendments as provided in CETA.</td>
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<td>• Adopt interpretations of the provisions of this Agreement, which shall be binding on dispute settlement bodies.</td>
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<td>• Take such other action in the exercise of its functions as decided by the Parties.</td>
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B. Ongoing management and supervision: Joint Committee (II)

**Ukraine DCFTA – Association Council**

| Tasks | • Supervises and monitors the application and implementation of the DCFTA. It examines any major issues arising under the DCFTA and any other bilateral or international issues of mutual interest.  
• Forum for exchange of information on Union and Ukrainian legislative acts, both under preparation and in force, and on implementation, enforcement and compliance measures.  
• Role in Dispute Settlement |

| Powers | • Delegate responsibilities to the specialised committees.  
• In line with the objective of gradual approximation of Ukraine's legislation to that of the Union, the Association Council may update or amend the Annexes to the DCFTA, taking into account the evolution of EU law.  
• It may also take decisions as regards further market opening if the Parties agree that the measures covered by the Title on Trade and Trade-related Matters have been implemented and are being enforced.  
• It may also make recommendations. |
## Ongoing management and supervision: Joint Committee (III)

### EEA Agreement – Joint Committee

#### Tasks
- Ensures the effective implementation and operation of the EEA Agreement. To this end, it carries out exchanges of views and information and take decisions in the cases provided for in the EEA Agreement.
- Consultations take place on Commission proposals for new Union acquis that the EEA/EFTA States will also apply to them.
- Keeps under constant review the development of the case law of the Court of Justice of the European Union and the EFTA Court to preserve the homogeneous interpretation of the Agreement.
- Role in Dispute Settlement

#### Powers
- Delegate responsibilities to the specialised committees.
- Can amend the Annex to the EEA Agreement setting out the EU acquis that applies also the EEA/EFTA States.
- If no agreement on the updating of the Annex is possible, the Joint Committee examines all possibilities to maintain the good functioning of the EEA Agreement.
C. Dispute Settlement

I. Political vs. judicial dispute settlement

- Political dispute settlement: typically Joint Committee

- Judicial dispute settlement: typically arbitration panel – question of involvement of ECJ
## II. 3 Existing models - Overview

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<th>CETA</th>
<th>Ukraine Association</th>
<th>EEA</th>
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<td><em>Does not rely on EU law or EU law concepts.</em>&lt;br&gt;&lt;br&gt;Classical international law mechanism: following a dialogue phase, disputes can be submitted to arbitration. Arbitral rulings are binding on the parties.&lt;br&gt;&lt;br&gt;No involvement of the ECJ.&lt;br&gt;&lt;br&gt;Specific dispute settlement system for investment disputes (Investment Court System).</td>
<td><em>Relies in part on EU law and EU law concepts.</em>&lt;br&gt;&lt;br&gt;Classical international law mechanism: following a consultation phase, disputes can be submitted to arbitration. Arbitral rulings are binding on the parties.&lt;br&gt;&lt;br&gt;Where a dispute raises a question of interpretation of EU law, the arbitration panel must request an ECJ ruling. The ECJ ruling is binding on the arbitration panel.</td>
<td><em>Relies heavily on EU law and EU law concepts.</em>&lt;br&gt;&lt;br&gt;Interpretation / application of the Agreement...&lt;br&gt;&lt;br&gt;...in the EEA/EFTA countries: EFTA Surveillance Authority + EFTA Court&lt;br&gt;&lt;br&gt;Mechanisms for ensuring homogeneous interpretation of the Agreement in the EU and in the EEA/EFTA countries.&lt;br&gt;&lt;br&gt;Disputes between EU and EEA/EFTA countries go to the Joint Committee. When the Joint Committee is unable to settle a dispute within 3 months:&lt;br&gt;&lt;br&gt;→ if dispute concerns provisions that are identical to EU law, parties can jointly submit to the ECJ;&lt;br&gt;→ if dispute concerns other provisions, each party can submit it to arbitration.</td>
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III. Analysis of existing model 1: CETA

- Classic international law arbitration – no EU law concepts – no ECJ
- Difficult to use for Withdrawal Agreement, given multiple reliance on EU law concepts
- Conceivable for future relations agreement(s), depending on content
IV. Analysis of existing model 2: Ukraine Association

- Classic international law arbitration – reliance on EU law concepts – preliminary reference to ECJ

- Conceivable for both the Withdrawal Agreement and for future relations agreement(s)
V. Analysis of existing model 3: EEA

- Heavy reliance on EU law concepts
- Limited inter-party dispute settlement
- Strong enforcement on either side, through Commission + ECJ and through multilateral bodies: ESA + EFTA Court
- EEA: multilateral dispute settlement mechanism not transposable to a bilateral EU-UK agreement
VI. Analysis of the "EEA-docking" idea

- Basic assumption: UK not to accede to the EEA

- The "EEA-docking" idea: description

- "EEA-docking" idea for future relations: legal, institutional, political issues
VII. The situation as regards Switzerland

- Shortcomings of the existing framework i.e., not a model
- Ongoing institutional negotiations
VIII. Conclusions on dispute settlement

• For the Withdrawal Agreement

• For the future relations agreement(s)
D. Enforcement post dispute-settlement

I. Enforcement process post dispute settlement

Example: CETA

- Panel finds infringement
- Infringing party has to comply in reasonable period
- Dispute about length of reasonable period: original panel makes determination
- Non-compliance with ruling: complaining party can resort to sanctions (suspension or compensation). Suspension must be equivalent to the infringement.
- Dispute about compliance or proportionality of suspension: original panel makes a determination (no suspension until determination is made).
- If infringing party returns to compliance, it can request the suspension to be lifted.

At any time, the complainant may request the respondent to provide an offer for temporary compensation and the respondent shall present such offer.
## II. Enforcement post dispute settlement - Available sanctions (existing models)

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<th>Agreement</th>
<th>Available Sanctions</th>
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| CETA          | • Suspend obligations or receive compensation.  
• The suspension of obligations must be limited at a level equivalent to the nullification / impairment caused by the violation.                                           |
| Ukraine DCFTA | • Respondent shall, if so requested by the complainant, present an offer for temporary compensation.  
• If no agreement on compensation is reached, the complainant is entitled to suspend obligations at a level equivalent to the nullification / impairment caused by the violation. |
| EEA           | • Where a dispute cannot be resolved in the JC, a party may, in order to remedy possible imbalances:  
  ➢ either take a safeguard measure;  
  ➢ proceed to suspend the affected part of the Agreement  
• Safeguard measures must be restricted to what is strictly necessary in order to remedy the situation.  
• If a safeguard measure creates an imbalance, the other party may take such proportionate rebalancing measures as are strictly necessary to remedy the imbalance. |